

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1098

To be argued by
ROBERT N. SHWARTZ

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1098

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR RAMIREZ,

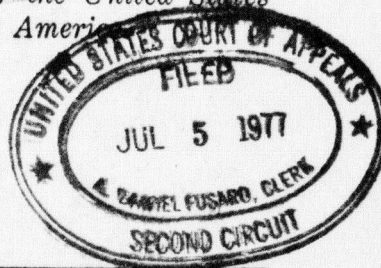
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America*

ROBERT N. SHWARTZ,
JAMES A. MOSS,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*



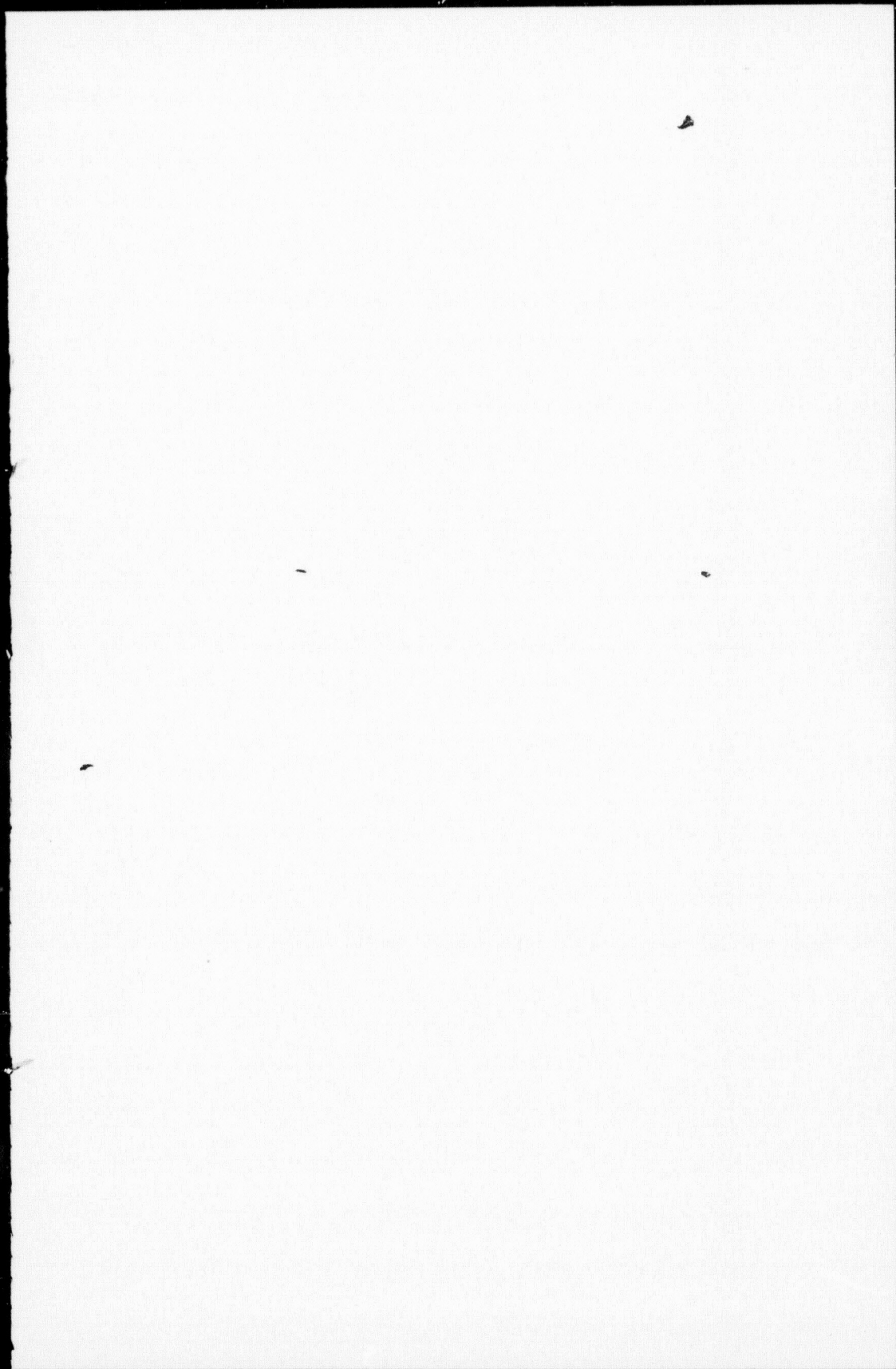


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
A. The August 15, 1975 Transaction	2
B. The Overall Conspiracy	3
The Defense Case	4
ARGUMENT:	
POINT I—The Tapes And Transcripts Were Properly Admitted Into Evidence	4
A. Admissibility of the Tapes and Transcripts	5
B. Refusal to Permit Defendant to Impeach Rivera's "Credibility" by His Prior Criminal Record Was Proper	10
POINT II—The Informant's Death Provides No Basis For Dismissal of the Indictment	11
POINT III—The Court's Charge and Response to Jury Notes During Deliberation Was Proper ..	14
A. The Court's Charge on Voice Identification	15
B. Re-reading of Testimony	17
C. The Magnifying Glass	20
CONCLUSION	22

TABLE OF CASES

	PAGE
<i>Imperial Meat Co. v. United States</i> , 316 F.2d 435 (10th Cir.), <i>cert. denied</i> , 375 U.S. 829 (1963)	21
<i>Monroe v. United States</i> , 234 F.2d 49 (D.C. Cir. 1954), <i>cert. denied</i> , 352 U.S. 873 (1956)	6
<i>Rovario v. United States</i> , 353 U.S. 53 (1957)	12
<i>Stubbs v. United States</i> , 428 F.2d 885 (9th Cir. 1970), <i>cert. denied</i> , 400 U.S. 1009 (1971)	6
<i>Taylor v. Reo Motors, Inc.</i> , 275 F.2d 699 (10th Cir. 1960)	22
<i>Throckmorton v. St. Louis-San Francisco Ry. Co.</i> , 179 F.2d 165 (8th Cir.), <i>cert. denied</i> , 339 U.S. 944 (1950)	22
<i>United States v. Adams</i> , 385 F.2d 548 (2d Cir. 1967)	21
<i>United States v. Albergo</i> , 539 F.2d 860 (2d Cir.), <i>cert. denied</i> , 45 U.S.L.W. 3416 (December 7, 1976)	9, 16
<i>United States v. Armedo-Sarmiento</i> , 545 F.2d 785 (2d Cir. 1976)	6, 9
<i>United States v. Baum</i> , 482 F.2d 1325 (2d Cir. 1973)	10
<i>United States v. Bonanno</i> , 487 F.2d 654 (2d Cir. 1973)	16
<i>United States v. Borrone-Iglar</i> , 468 F.2d 419 (2d Cir. 1972)	16
<i>United States v. Camporeale</i> , 515 F.2d 184 (2d Cir. 1975)	21
<i>United States v. Chiarizio</i> , 525 F.2d 289 (2d Cir. 1975)	7
<i>United States v. DePalma</i> , 414 F.2d 394 (9th Cir. 1969), <i>cert. denied</i> , 396 U.S. 1046 (1970)	19

	PAGE
<i>United States v. Frattini</i> , 501 F.2d 1234 (2d Cir. 1974)	21
<i>United States v. Kelly</i> , 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966)	17
<i>United States v. Lemonakis</i> , 485 F.2d 941 (D.C. Cir.), cert. denied sub nom., <i>Enten v. United States</i> , 415 U.S. 989 (1973)	8
<i>United States v. McKeever</i> , 169 F. Supp. 426 (S.D. N.Y. 1958), rev'd on other grounds, 271 F.2d 669 (2d Cir. 1959)	6
<i>United States v. Ortega</i> , 471 F.2d 1350 (2d Cir. 1972), cert. denied, 411 U.S. 948 (1973) ...	11, 13
<i>United States v. Osser</i> , 483 F.2d 727 (3d Cir.), cert. denied, 414 U.S. 1028 (1973)	7
<i>United States v. Pastore</i> , 537 F.2d 675 (2d Cir. 1976)	16
<i>United States v. Pinto</i> , 503 F.2d 718 (2d Cir. 1974)	16
<i>United States v. Pollack</i> , 474 F.2d 828 (2d Cir. 1973)	20
<i>United States v. Price</i> , 447 F.2d 23 (2d Cir.), cert. denied, 404 U.S. 912 (1971)	19
<i>United States v. Rizzo</i> , 492 F.2d 443 (2d Cir.), cert. denied, 417 U.S. 944 (1974)	16
<i>United States v. Rosenwasser</i> , 550 F.2d 806 (2d Cir. 1977)	10
<i>United States v. Russ</i> , 362 F.2d 843 (2d Cir.), cert. denied, 385 U.S. 923 (1966)	11
<i>United States v. Santiago</i> , 528 F.2d 1130 (2d Cir.), cert. denied, 425 U.S. 972 (1976)	16
<i>United States v. Soles</i> , 482 F.2d 105 (2d Cir.), cert. denied, 414 U.S. 1027 (1973)	12

	PAGE
<i>United States v. Stassi</i> , 544 F.2d 579 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3586 (March 1, 1977)	13
<i>United States v. Taylor</i> , Dkt. No. 76-1210, slip op. 2805 (2d Cir. April 13, 1977)	17
<i>United States v. Turbide</i> , Dkt. No. 76-1533, slip op. 4341 (2d Cir. June 22, 1977)	11, 12
<i>United States v. White</i> , 401 U.S. 745 (1971)	7
<i>United States v. White</i> , 324 F.2d 814 (2d Cir. 1963)	11, 13

STATUTES AND OTHER AUTHORITIES

Title 18, United States Code, Section 2	1
Title 21, United States Code, Sections 812, 841(a) (1), 841(b)(1)(A) and 846	1
Fed. R. Crim. P. 30	16
Fed. R. Crim. P. 52(b)	16
Fed. R. Evid. 901	6
3 Scott, <i>Photographic Evidence</i> § 1483 (2d ed. 1969)	22
3 Wharton's <i>Criminal Evidence</i> § 624 (13th ed. 1973)	22

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1098

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR RAMIREZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Victor Ramirez appeals from a judgment of conviction entered on January 31, 1977 in the United States District Court for the Southern District of New York after a five-day trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Indictment 76 Cr. 296, filed March 25, 1976, charged Ramirez and his co-defendant Herminio Gutierrez in two counts with the distribution of and possession with intent to distribute heroin, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2, and with conspiracy to commit these offenses, in violation of Title 21, United States Code, Section 846.

On November 30, 1976, the jury returned a verdict of guilty as to Ramirez * on Count One (the conspiracy

* Co-defendant Gutierrez, a fugitive, was not on trial.

charge). Judge Pierce then dismissed Count Two (the substantive count) as to Ramirez upon the consent of the Government.

On January 31, 1977, Ramirez was sentenced to a term of four years' imprisonment and three years' special parole.

Statement of Facts

The Government's Case

The proof at trial focused upon Ramirez' participation in a one-eighth kilogram heroin transaction on August 15, 1975 and upon his participation during August 1975 in a broader conspiracy to distribute heroin with, among others, co-conspirators Fernando Gallardo, Raymond Valentine and Benito Cruz and co-defendant Gutierrez.

A. The August 15, 1975 Transaction

On August 15, 1975, Rene Rivera, a Government informant, met with co-defendant Herminio Gutierrez on Pitt Street in Manhattan, and negotiated for the purchase of one-eighth of a kilogram of heroin for \$6,000. Rivera offered to make an initial payment of \$5,000 upon receiving the heroin and a second payment of the remaining \$1,000 within a few days thereafter. Gutierrez instructed Rivera to "see Victor." (Tr. 37, 48, 322, 326-27; GX 5).*

*References to the trial transcript are abbreviated herein as "Tr.", the Government's trial exhibits as "GX", the Defendant's trial exhibits as "DX", the Court's exhibits as "CX", Ramirez' brief as "Br.", and Ramirez' appendix as "App".

Within an hour of this first meeting, Rivera and Gutierrez met again at the same location, with Victor Ramirez present. It was arranged that Rivera would meet Ramirez later that day at the corner of Ridge and Stanton Streets, and that Rivera would receive the heroin there. (Tr. 49-52, 329-30; GX 6, 12-14).

Later the same evening, Rivera and Ramirez met near the corner of Ridge and Stanton Streets and retired to the vestibule of 195 Stanton Street. There Ramirez delivered approximately four ounces of brown rock heroin to Rivera in exchange for \$5,000. Ramirez then left the building counting the money and drove to Prince and Elizabeth Streets, in Manhattan, where he met with Gutierrez. (Tr. 56-57, 96, 191-98, 333-36; GX 4, 7, 12-25).

On August 20, 1975, Rivera delivered the remaining \$1,000 to Gutierrez on Pitt Street. (Tr. 60-63, 79-84; GX 8). Two days later, Rivera again met with Gutierrez and complained that he might have mistakenly given Gutierrez too much money. At that time Gutierrez assured Rivera that he (Gutierrez) and Ramirez had both counted the money received from Rivera and that it had been the correct amount. (Tr. 84-86; GX 9).

B. The Overall Conspiracy

Through the testimony of co-conspirators Raymond Valentine and Benito Cruz, the Government adduced evidence of Ramirez' participation with Gutierrez, Fernando Gallardo and others in August 1975 in a wide-ranging conspiracy to distribute brown rock heroin.

Raymond Valentine testified that he purchased one-quarter kilogram packages of heroin from either Gutierrez, Gallardo or Ramirez on six different occasions in August, 1975. Ramirez personally participated in three

of these transactions. (Tr. 160-88). Benito Cruz testified that in August 1975 Gallardo told him that Ramirez and Gutierrez had recently sold ninety one-quarter kilogram packages of heroin, and that immediately thereafter Gutierrez had admitted to him that he shared \$90,000 in profits with Ramirez in connection with these sales. (Tr. 235-45).

The Defense Case

The defendant called no witnesses on his own behalf and offered only three transcripts (through a Government witness) of taped conversations between Rivera, Gutierrez and the defendant. (DX A, B, C). These transcripts were simply earlier drafts of the transcripts offered by the Government.

ARGUMENT

POINT I

The Tapes And Transcripts Were Properly Admitted Into Evidence.

The defendant contends that the tapes and transcripts of five conversations between the informant on the one hand and the defendant and or Gutierrez on the other were inadmissible because the informant was not available at trial. The defendant claims that no foundation was established for the admission of these tapes and transcripts. The defendant further asserts that, even if the District Court was correct in admitting the tapes and transcripts, it was reversible error to refuse to permit the defendant to impeach the deceased informant's credibility by offering his criminal record. The defendant's contentions are without merit.

A. Admissibility of the Tapes and Transcripts

The Government offered five transcripts and the corresponding tapes of recorded conversations between the informant and Ramirez and/or Gutierrez. (GX 1-3, GX 5-9).*

To establish a foundation for the admission of the tapes and transcripts the Government called Special Agent William F. Mockler, Jr. of the Drug Enforcement Administration, who testified that he had had conversations with Rene Rivera, Victor Ramirez and Herminio Gutierrez. He testified that he was familiar with and could identify each of their voices. (Tr. 113-14, 128-31). Prior to trial he sat down with Margarita Cartagena, a Spanish to English interpreter, and listened to some of the tapes. Agent Mockler identified the voices on the tape for Ms. Cartagena. Ms. Cartagena had already listened to the taped conversations, transcribed them in Spanish and translated them into English. As she and the Agent reviewed the tapes together Agent Mockler would identify voices on the tapes as Ramirez, Gutierrez or Rivera. Ms. Cartagena testified that she was able to associate names with voices based on the use of names during the taped conversations as well as the identification of voices provided to her by Special Agent Mockler. She further testified that after listening to the tapes often enough she was able to recognize and distinguish the same voices on other tapes without Mockler's assistance. (Tr. 289-92). The foundation for the tapes and transcripts was further established by the testimony of surveillance agents who in-

* Because the tapes were in Spanish, the transcripts (Spanish with English translation) were admitted in evidence and read to the jury. The defendant stipulated to the submission of the transcripts in evidence, once the District Court had overruled his objections to the tapes, since the tapes were all in Spanish. (Tr. 310-13).

stalled the Nagra recording device, observed the informant meeting with Ramirez and Gutierrez, and took custody of the tapes after the observed meetings. (Tr. 40-64, 80-83, 85-87, 323-27, 334-36). ¶

This evidence more than met the requirement of Rule 901, Fed. R. Evid. The general provision of that rule states that

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a).

With respect to the identification of a voice on a tape recording, Fed. R. Evid. 901(b)(5) gives the following as one of its "examples of authentication or identification conforming with the requirements of this rule:

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

The defendant suggests that the unavailability of the informant automatically made these tapes inadmissible. However, there is no rule that only a participant in the conversation may authenticate the tapes or identify the voices thereon. See *United States v. Arredo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976); *Stubbs v. United States*, 428 F.2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 1009 (1971); *Monroe v. United States*, 234 F.2d 49, 54 (D.C.Cir. 1954), cert. denied, 352 U.S. 873 (1956).

The cases cited by the appellant are not to the contrary. In *United States v. McKeever*, 169 F. Supp. 426, 430-31 (S.D.N.Y. 1958), rev'd on other grounds, 271

F.2d 669 (2d Cir. 1959), the District Court found the foundation inadequate where the witness after listening to the tape stated that he recalled "that conversation." There was no corroboration by the defendant, who was offering the tape for impeachment purposes, of the circumstances, context, participants in, or timing of the alleged taped conversation. In the case at bar surveillance agents, in addition to identifying the voices on the tapes, were able to confirm the time, date, participants and circumstances of taped conversations. The agents testified about outfitting Rivera with the recording devices and the custody of the tapes. (Tr. 40-64, 80-83, 85-87, 323-27, 334-36).*

Although appellate counsel now complains that the defendant was precluded from inquiring "whether the informant might possibly have manipulated the recording device," (Br. 17), this contention was not pressed in the trial court. Had trial counsel entertained serious concern about the possibility of tampering, he could have moved for an expert's examination. The Government was not obliged to negate unarticulated or unsubstantiated claims of tampering in order to meet the threshold standard of admissibility. See *United States v. Chiarizio*, 525 F.2d 289, 295-96 (2d Cir. 1975).

In addition to claiming that the tapes and transcripts were not properly authenticated and identified, the defendant further contends that the absence of Rivera denied him his Sixth Amendment right of confrontation.

* *United States v. White*, 401 U.S. 745 (1971) and *United States v. Osser*, 483 F.2d 727 (3d Cir.), cert. denied, 414 U.S. 1028 (1973), cited by appellant, do not address the question of authentication at all. These cases simply recognize that no Fourth Amendment right is violated when a conversation is taped with the consent of one of the participants and subsequently offered in evidence.

The Government's offer of the transcripts (GX 5-9) and the tapes (GX 1-3) was a limited offer. The statements of the appellant and Gutierrez in the transcripts were offered for the truth of what they asserted under the admissions and co-conspirator's statements exceptions to the hearsay rule. Rivera's statements were expressly not offered for the truth of what was said but only for the fact that such statements were made and to put in context the statements made by Ramirez and Gutierrez. In an effort to insure that Rivera's statement could be fairly received on this basis, the trial judge reviewed the transcripts and redacted those portions which could arguably cause prejudice. (Tr. 270).

This identical procedure employed here was approved in *United States v. Lemonakis*, 485 F.2d 941, 947-49 (D.C. Cir.), cert. denied sub nom., *Enten v. United States*, 415 U.S. 989 (1973). The Court upheld the admission of tape recordings between the "principal accusatory figure", deceased by the time of trial and a defendant. The defendant's statements on the tapes were admissible as admissions; the deceased informant's statements were admissible for the limited purpose of making the defendant's responses intelligible to the jury and recognizable as admissions.

Contrary to the exaggerated claims in the defendant's brief, (Br. 11), the Assistant United States Attorney did not overemphasize the five transcripts in his summation. By quoting out of context, the defendant's brief claims that the prosecutor argued that the tapes and transcripts were "crucial evidence" in the case. (Br. 11, 18). In fact, the prosecutor merely argued that the "crucial evidence" in the case dealt with the transaction on August 15, 1975 and that surveillance testimony.

photographs and the tapes were all relevant to that event.*

The defendant's arguments challenging the tapes' accuracy and completeness, the accuracy of the voice identification and the transcription and translation of the tapes really go to the weight and not the admissibility of the tapes and transcripts. See *United States v. Armedo-Sarmiento*, *supra*; *United States v. Albergo*, 539 F.2d 860 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3416 (Dec. 7, 1976). Defense counsel fully aired these points with the jury, which was the appropriate forum for the issue. (Tr. 417-24).

* What the Assistant United States Attorney said in its entirety is:

Now, you will recall, I'm sure, one week ago when Mr. Holtzman first addressed you that he predicted that the testimony of Benito Cruz and the testimony of Raymond Valentine would be the crucial evidence in this case supporting the government's theory. That's what he said a week ago but I think you will realize now after having heard all of the evidence, that that simply is not true. The government's case does not rise and fall solely on the testimony of those two witnesses. They are helpful, helpful to understanding the relationship between Victor Ramirez and Cuba and Fernando Gallardo. They fit in context. They tell us how in general and how on a day-to-day basis these people dealt in heroin on the Lower East Side.

But, ladies and gentlemen, the crucial evidence in this case, if there is any crucial evidence, has to be the evidence that deals with the one narcotics transaction that took place on August 15 of 1975.

We have several different varieties of evidence about what took place that day. We have the testimony of several surveillance officers who were watching Rene Rivera. They were watching Victor Ramirez and they were watching Herminio Gutierrez, and I will review their testimony.

We have the photographic evidence, the pictures that were taken by Detective Vallely from his surveillance truck and finally we have the transcripts of the actual conversations that were recorded on the Nagra tape that was being worn by Rene Rivera on that date. (Tr. 381-82).

B. Refusal to Permit Defendant to Impeach Rivera's "Credibility" by His Prior Criminal Record Was Proper

The defendant argues that even if the tapes and transcripts were properly admitted, he should still have been permitted to impeach the informant's credibility by offering Rivera's prior criminal record. The Government offered the informant's statements for a very limited purpose—solely for the fact that they were said to give context to the defendant's and Gutierrez' statements and responses in the transcripts. (Tr. 270-72). A review of the transcript demonstrates that none of the informant's statements was significant enough to be a source of prejudice. Indeed, the defendant is unable to point to a single line of Rivera's statements in the transcripts to substantiate his claims of prejudice. Thus, since Rivera's statements were innocuous and were admitted only to allow the jury to make sense of the conversation, Rivera's credibility was never put in issue. Clearly, then, impeachment of Rivera was properly denied.

The District Court repeatedly gave clear cautionary instructions explaining the limited purpose of Rivera's statements on the transcripts. (Tr. 314-16, 504, 541). The defendant contends that "the informer's statements were inevitably considered by the jurors for their truth" (Br. 20) despite the Court's instructions. However, absent unusual circumstances, which are not present here, the law presumes that the jury understood and followed the Court's instruction. See, e.g., *United States v. Rosenwasser*, 550 F.2d 806, 807-09 (2d Cir. 1977); *United States v. Baum*, 482 F.2d 1325, 1332 (2d Cir. 1973).

POINT II

The Informant's Death Provides No Basis For Dismissal of the Indictment.

The Government's informant, Rene Rivera, was fatally shot ten times by person or persons yet unknown on April 18, 1976, three weeks after the indictment in this case was filed. (Document #16 to the Record on Appeal). The defendant contends that his conviction should be reversed and the indictment dismissed because the Government failed to preserve the informant's availability.

The defendant concedes, as he must, that the Government is not the "guarantor" of an informant's appearance at trial. (Br. 22). See, e.g., *United States v. Turbide*, Dkt. No. 76-1533, slip op. 4341, 4355 (2d Cir. June 22, 1977); *United States v. Ortega*, 471 F.2d 1350, 1358-59 & n.2 (2d Cir. 1972), cert. denied, 411 U.S. 948 (1973); *United States v. Russ*, 362 F.2d 843, 844 (2d Cir.), cert. denied, 385 U.S. 923 (1966); *United States v. White*, 324 F.2d 814, 816 (2d Cir. 1963). Nonetheless he argues that the Government must bear the responsibility for Rivera's death because of an alleged failure to cooperate in securing the informant's presence and availability six months before the trial.

This contention ignores the fact that the Government did take steps to protect the informant and to preserve his availability for trial. A week before the fatal shooting, the Government offered to put Rivera in the United States Marshal's Witness Protection Program. Rivera refused the offer. (Document #16 to the Record on Ap-

peal). Without Rivera's consent to be protected, there was nothing more that the Government could do.*

In arguing that his defense was hopelessly damaged by the death of the informant, the defendant has blithely assumed that he was entitled to the disclosure of the informant's identity and production for trial. The record below did not support such a finding. The Government is not obliged to identify and to produce its informant in every case. *Rovario v. United States*, 353 U.S. 53 (1957); *United States v. Turbide*, Dkt. No. 76-1533, slip op. 4341, 4352-56 (2d Cir. June 22, 1977); *United States v. Soles*, 482 F.2d 105 (2d Cir.), cert. denied, 414 U.S. 1027 (1973). The mere unsupported claim that the defendant was entrapped is insufficient to require that the

*The defendant suggests that the informant should have been held as a material witness. (Br. 22). This glib suggestion ignores the reality that jail is not necessarily a safe place for an informant.

The defendant similarly argues that, in anticipation of the informant's death, the Government should have made the informant available to the defense so that his testimony could be preserved. For the Government to employ such a procedure where an informant is in jeopardy would obviously be irresponsible. Once the informant is produced to have his testimony preserved, his identity has been exposed, confirming to those who were seeking to harm him that they are pursuing the right person.

While appellate counsel now has many suggestions as to steps which the Government should have taken to have the informant available, he ignores the steps which defense counsel could have taken. Defense counsel's letter of March 24, 1976, (App. Exhibit D), ominously warns that the Government should "begin to undertake measures calculated to insure that the Government will be in a position to comply" with an order to make the informant available. This comment leaves the impression that the defense was aware that the informant was in danger. Yet no motion was made by the defense to have the informant held as a material witness or to have his testimony preserved by deposition.

informant's identity be revealed. *United States v. Ortega*, 471 F.2d 1350, 1357-59 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973).^{*} Of course, if the defendant was not entitled to have the informant's identity revealed, he is surely not entitled to dismissal of the indictment on the grounds that the informant was unavailable.

The defendant cites no cases where an indictment has been dismissed on the ground that the Government failed to assure the informant's presence at trial by preventing his death. In *United States v. White*, 324 F.2d 814 (2d Cir. 1963), this Court reversed a conviction because the District Court had denied a request for an adjournment of the trial for several weeks to permit the informant to recover from a severe beating. In this case, a brief delay would not have served to make the informant available again. In *United States v. Stassi*, 544 F.2d 579, 582-83 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3586 (March 1, 1977), the U. S. Parole Board paroled and

^{*} While it is true that defense counsel did seek the identity and whereabouts of the Government informant before his death, the claim that the informant's presence at trial was needed to establish an entrapment defense was only made after his death. (Br. 3-4). Even then, no showing was made that would have supported a finding that the identity of the informant be revealed.

As to the viability of any claimed entrapment defense, it must be remembered that the case at bar was not a case where the Government's proof showed the defendant involved in a single, isolated narcotics transaction. The defendant was shown to be involved in many specific narcotics transaction with several individuals, sharing in \$90,000 of profits from heroin. (Tr. 160-88, 235-45).

In attacking the admissibility of the tapes, *see* Point I, *supra*, the defendant contends that an unidentified voice was present on one of the transcripts. (GX 7). If defendant's position is correct, then he is uniquely situated to know who was present when the now-deceased informant allegedly entrapped him. The District Court properly denied the appellant's request for an entrapment instruction. (Tr. 363).

deported a co-conspirator and material witness just prior to the issuance of an indictment. The defendants sought to dismiss the indictment for the prosecution's failure to take steps necessary to preserve the cooperating confederate's presence for trial. The Court declined to attribute the Parole Board's conduct to the prosecution.

In sum, unknown persons killed an informant who had declined the Government's offer to place him in a protected situation. While the defendant never made a showing that would have entitled him to production of the informant in this case, even if he had, the informant's death would not and should not entitle him to dismissal of the indictment. To fashion a rule that required dismissal of a case that can be proved without the informant's testimony would only serve to encourage defendants to solve their legal problems by disposing of informants.

POINT III

The Court's Charge and Response to Jury Notes During Deliberation Was Proper.

The defendant raises three separate issues on appeal that relate to the court's instructions to the jury and the jury's deliberation. First, the defendant claims that the court failed to instruct the jury as to *how* they were to determine the question of voice identification. Second, the defendant argues that the District Court failed to have certain testimony reread. Third, the defendant demands a new trial because the trial judge provided the jury with a magnifying glass upon its request. Each point was properly handled by the trial judge.

A. The Court's Charge on Voice Identification

The defendant claims that the court failed to properly instruct the jury on the issue of voice identification. Quite to the contrary, Judge Pierce went to great pains to alert the jury to the need for them to determine whose voices were on the tapes. The District Judge did this, without having been requested to do so, during the trial. (Tr. 314). The point was reemphasized in the charge to the jury.*

* The Court's charge on this point was as follows:

Now, certain of the evidence in this trial was admitted by way of tape recordings of certain alleged conversations. During the course of this trial transcripts of the tape recordings were received in evidence. By agreement of both counsel, the tapes were not played to you since they are said to be mostly in Spanish. Transcripts, which are normally only made available to a jury to aid in your understanding or listening to tapes, in this instance have been received in evidence and they are available to you upon request.

There is a dispute between the parties as to whose voices are on the tapes, and also as to what was said by each speaker, and as to whether the transcripts set forth as fully as possible all that can be heard on the tapes and understood from listening to the tapes.

If you have questions in your minds as to any of these matters, the tapes are available to you to be played; both the tapes and the transcripts are in evidence and the tapes may be played to you even though they are in Spanish. Should it appear to you that the transcripts vary from the tapes in any respect, it will be your hearing of the tapes that governs. You, the jury, must determine as triers of the facts what was said in the conversations for which tape recordings and transcripts were offered into evidence.

Now, of course, on those transcripts you will find both Spanish, which purports to be that which was taken from the tapes, and then you will find the translation into English—at least it purports to be the translation from Spanish into English. You will have to make judgments about all of these matters, keeping in mind what testimony has been presented and what issues have been raised here. (Tr. 458-60).

Now, on appeal, the defendant contends that the trial judge should not only have told the jury that they had to decide the issues of voice identification, but should have told the jury how to go about deciding it. (Br. 24-23). Defendant's contention is meritless for at least two reasons. First, having failed to submit such a detailed request to the trial judge * or to raise the point with the trial judge when given an opportunity to do so after his charge (Tr. 483-503), the defendant can only claim plain error on appeal. Fed. R. Crim. P. 30, 52(b); *United States v. Pastore*, 537 F.2d 675, 678 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Pinto*, 503 F.2d 718, 723 (2d Cir. 1974).**

* Defendant's request No. 9 read in toto:

The evidence in this case has included certain tape recordings which the Government claims contain in parts, the voices of Herminio Gutierrez and Victor Ramirez. To the extent that you find it necessary in arriving at your verdict to determine whether the questioned voices are those of Gutierrez and Ramirez, I charge you that before you can conclude that any voice on the tape is that of Ramirez, you must be convinced of the fact beyond a reasonable doubt.

** The defendant cites no case suggesting that a failure to charge a jury on how to make a voice identification constitutes plain error. Indeed, the cases cited by appellant support the Government's position. In *United States v. Albergo*, 539 F.2d 860, 863-64 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3416 (Dec. 7, 1976), this Court upheld a voice identification, noting that "the question is for the jury if, as reasonable men, they could find the claimed identification to be accurate." In *United States v. Rizzo*, 492 F.2d 443, 448 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974), this Court held that "[t]he standard for the admissibility of an opinion as to the identity of a speaker is merely that the identifier has heard the voice of the alleged speaker at any time." There this Court tended to agree that the witnesses' minimal exposure to the appellant's voice made their identification "doubtful", but upheld the instruction recognizing that such doubts went to weight, and not admissibility. *Accord: United States v. Bonanno*, 487 F.2d 654, 655, 659 (2d Cir. 1973); *United States v. Borrone-Iglar*, 468 F.2d 419, 420-21 (2d Cir. 1972).

Second, the Court in its instructions on how to evaluate the evidence generally and assess a witness' credibility covered much of the ground that the appellant now claims the Court should have specifically mentioned. (Tr. 460-63). *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2837 (2d Cir. April 13, 1977); *United States v. Kelly*, 349 F.2d 720, 760-61 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

B. Re-reading of Testimony

The defendant argues that his conviction should be vacated because the trial judge refused to have certain testimony re-read which the jury had requested. This claim mischaracterizes the record, which reveals that Judge Pierce made every effort to respond to each of the jury's requests and that this testimony was not re-read only because the jury ultimately decided that it no longer wished to hear it.

On November 30th the jury resumed its deliberations from the night before. The record reveals that three notes were received simultaneously. One note asked to have the testimony of Valentine and Cruz read back plus the conspiracy portion of the charge. (CX 12; Tr. 519). The second note asked for Agent Mockler's testimony plus the tape corresponding to one of the transcripts. (CX 13; GX 7; Tr. 519-20). The third note from the jury requested no further evidence; it simply asked to hear the Mockler testimony and the tape to GX 7 before the Valentine and Cruz testimony. (CX 14; Tr. 520).

After reviewing the notes with counsel, the Court brought the jury in and said:

"Good morning, ladies and gentlemen. We have here various notes and we think we understand what it is you wish. We are going to give

you the conspiracy charge first, and then we will give you probably the Mockler testimony, and then the playing of the tape as far as transcript 72 [sic] is concerned. Then if you still wish Cruz and Valentine's testimony, that will be available to you as per your request." (Tr. 521-22).

The Court then repeated its conspiracy charge to the jury. (Tr. 522-31). The Court then sent the jury back to the jury room for five or ten minutes while the precise portion of the requested tape was located. (Tr. 531-32). While the jury was out, the Court received another note, (CX 15), which requested the transcript and raised a question about the period of the alleged conspiracy. (Tr. 532-36). After counsel had presented their views on the appropriate supplemental charge in response to CX 15, the Court had the jury brought back in. The Court explained the conspiracy question to the jury, distributed the transcripts (GX 7 and DX A) and played the corresponding tape for the jury. (Tr. 540-43).

After the tape was played, Agent Mockler's testimony was read to the jury as per CX 13 and 14. (Tr. 543). The record reflects that just before the Mockler testimony was read, another note was received from the jury. (CX 16; Tr. 544). This note requested the Court to "reread the modification of your charge as read yesterday regarding conspiracy. After tapes please." (Tr. 544). The Court satisfied this request with a supplemental charge that mere presence did not make out a conspiracy. (Tr. 545-46). It was now 1:45 p.m. in the afternoon and the Court told the jury:

"We will not read to you the testimony of Valentine and Cruz at this time. Chances are your lunch is here. We will take our own lunch as well. And you can resume your deliberations if you wish now, or at least after lunch, and if

you wish to have Valentine and Cruz read to you after lunch, send out a note and we will know that you are ready for that to be read." (Tr. 546).

The jury deliberated through the rest of the afternoon and on into the evening without ever asking for any further testimony, evidence or instructions. At approximately 10:50 p.m. the jury announced its verdict of guilty on Count One.

A review of the complete record thus clearly reveals that the Court never declined to have the Valentine and Cruz testimony read back to the jury. (Br. 25). The District Court received five notes from the jury on the morning of November 30th. The Court did its best to respond quickly to the notes, providing the requested evidence and instructions in the order that the jury preferred. (GX 14, 16). The Court discontinued when the jury's lunch had arrived indicating that it was prepared to resume the reading of previously requested testimony if the jury so wished. After lunch the jury by their silence indicated that they had changed their mind and were satisfied to continue their deliberations.

The cases cited by the defendant confirm that Judge Pierce's actions were well within the appropriate exercise of his discretion. In *United States v. DePalma*, 414 F.2d 394, 396-97 (9th Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970) and *United States v. Price*, 447 F.2d 23, 31 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971), the trial judge refused to have certain requested testimony reread to the jury. In *Price* the trial judge declined because he felt such requested testimony would present a "lopsided view". *Id* at 31. In both cases the Court of Appeals found such outright refusals to be within the broad discretion of the trial judge. *A fortiori*, the trial

judge has discretion in fixing the sequence of requested testimony.*

In the instant case, Judge Pierce complied with the jurors' requests. It was the jury which indicated its diminishing interest in the Valentine-Cruz testimony as it demanded other evidence and instructions first. Judge Pierce simply reminded the jury of their prior request when he told the jury they could hear the Valentine-Cruz testimony after lunch if they wished.

C. The Magnifying Glass

The defendant contends that the District Court erred in satisfying the jury's request for a magnifying glass. The defendant's contention borders on the frivolous.

At approximately 4:55 p.m. on November 29, 1976 the jury retired to commence their deliberations. (Tr. 508). At 5:40 p.m. the jury's first note (CX 9) was received, asking for, *inter alia*, all of the surveillance photographs in evidence. (GX 12-24). The pictures included a photograph which the Government argued showed Victor Ramirez leaving 195 Stanton Street on August 15, 1975 counting a sum of money in his hands. A second note (CX 10) was sent out by the jury less than an hour later asking, *inter alia*, "Can we have a magnifying glass to look at the pictures?" (Tr. 512).

* In *United States v. Pollack*, 474 F.2d 828, 831-32 (2d Cir. 1973), also cited by defendant, the jury requested that the transcribed testimony of a witness and the defendant be sent into the jury room. The trial judge refused to have the transcripts sent into the jury room but offered to have the testimony read to the jury. After consulting with the other jurors the foreman never requested such testimony read. This Court held that the trial court's actions were well within its discretion.

Over the objection of defense counsel,* the trial judge provided the jury with a magnifying glass as per their request. (Tr. 512-14).

The defendant cites a series of cases for the proposition that "a jury may only consider material that has been received in evidence." (Br. 28). That principle, though unquestionably sound, is inapposite in the case at bar. Each of the cases cited by defendant involved a situation where material or information relating to the subject of the jury's deliberations, but not in evidence, came to the jury's attention. *United States v. Camporeale*, 515 F.2d 184 (2d Cir. 1975) (inadequately redacted grand jury transcript received by jury); *United States v. Adams*, 385 F.2d 548 (2d Cir. 1967) (incriminating notes not in evidence received by jury).**

There was nothing improper or extraordinary about providing the jury with a magnifying glass to examine photographs that were properly admitted into evidence. By satisfying the jury's request the Court was simply maximizing the jury's ability to examine the evidence. Judge Pierce recognized this point. (Tr. 513). This is no different in principle than turning up the volume on a tape recorder at a juror's request while a tape in evidence is being played or furnishing an adding machine. *Imperial Meat Co. v. United States*, 316 F.2d 435, 439 (10th Cir.), cert. denied, 375 U.S. 820 (1963). Indeed, the courts and commentators have recognized

* Ironically, defense counsel had urged the jury in his summation to examine the photograph in order to determine if it depicted Ramirez counting money. (Tr. 424).

** The third case cited by defendant, *United States v. Frattini*, 501 F.2d 1234, 1235 n. 2 (2d Cir. 1974) is even less on point, appellant therein having conceded that the questioned document was in evidence, although it was improperly admitted hearsay.

the propriety of permitting a jury to use a magnifying glass during its deliberations. *Taylor v. Reo Motors, Inc.*, 275 F.2d 699, 706 (10th Cir. 1960); *Throckmorton v. St. Louis-San Francisco Ry. Co.*, 179 F.2d 165, 170-71 (8th Cir.), *cert. denied*, 339 U.S. 944 (1950); 3 Wharton's *Criminal Evidence* § 624, at 233 & n.73 (13th ed. 1973) and cases cited therein; 3 Scott, *Photographic Evidence* § 1483 at 312-14 nn. 86-87 (2d ed. 1969) and cases cited therein.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ROBERT N. SHWARTZ,
JAMES A. MOSS,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

